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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-783

FRANCIS McCARTHY, *Appellant*

v.

PHILADELPHIA CIVIL SERVICE COMMISSION, *Appellee*

JURISDICTIONAL STATEMENT

Appeal from the Commonwealth Court of Pennsylvania

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No.

Francis McCarthy, *Appellant*,

v.

Philadelphia Civil Service Commission, *Appellee*

JURISDICTIONAL STATEMENT

Appeal from the Commonwealth Court of Pennsylvania

Statement as to Jurisdiction

Appellant, pursuant to United States Supreme Court Rules 13(2) and 15, files this statement on the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment in question, and to show that a substantial federal question is presented in this case upon which this Court should exercise such jurisdiction.

Opinions Below

The opinion of the Philadelphia Civil Service Commission (Appendix A, *infra*), and the opinion of the Court of Common Pleas of Philadelphia (Appendix B, *infra*), have not been reported. The decision of the Commonwealth Court of Pennsylvania (Appendix C, *infra*) is reported at 339 A.2d 634 (1975). Denial of Allocatur by the Supreme Court of Pennsylvania (Appendix E, *infra*) has not been reported.

Jurisdiction

This civil proceeding originated before the Philadelphia Civil Service Commission, which dismissed appellant from his position as Fire Lieutenant in the Philadelphia Fire Department for alleged violation of §7-401(u) of the Philadelphia Home Rule Charter of 1951; §20-101 of the Philadelphia Code of Ordinances, and Philadelphia Civil Service Regulation 30.01, all having to do with a residency requirement of Civil Service employees of the City of Philadelphia. On appeal, the Court of Common Pleas of Philadelphia County affirmed, and on further appeal, the Commonwealth Court of Pennsylvania affirmed the decision of the Court of Common Pleas in a 5-2 decision filed on May 30, 1975. Thereafter, appellant filed a timely petition for allowance of appeal from the Commonwealth Court to the Supreme Court of Pennsylvania. Upon denial of allocatur by the Supreme Court of Pennsylvania, timely notice of appeal to this Court was filed in the Supreme Court of Pennsylvania on November 24, 1975 (Appendix E, *infra*). Since the Supreme Court of Pennsylvania refused to consider the merits of appellant's appeal, the judgment of the Commonwealth Court is reviewable by this Court as the judgment of the highest state court in which a decision could be had. *Minneapolis, St. P. & S.S.M. Ry. Co. v. Rock*, 279 U.S. 410 (1929); *Virginian Ry. Co. v. Mullens*, 271 U.S. 220 (1926).

Jurisdiction of this Court is conferred pursuant to 28 U.S.C. 1257(2), this being an appeal which draws into question the constitutionality of §7-401(u) of the Philadelphia Home Rule Charter of 1951; §20-101 of the Philadelphia Code of Ordinances, and Philadelphia Civil Service Regulation 30.01, which appellant has contended, at trial and on appeal, infringed upon his right to travel, and deprived him of equal protection under the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.[1] Appellant also contends that his dismissal is founded upon other errors, which deprived him of a fair hearing and constituted a denial of due process of law in violation of the Fourteenth Amendment. Though not subject to review by this Court on appeal, these additional errors and grounds for review are included in the statement of questions presented by the Appeal, hereinafter set forth, and it is respectfully requested that they be considered by the Court as if presented in a petition for Writ of Certiorari under 28 U.S.C. §1257(3). They are included with this appeal under the authority of *Prudential Insurance Co. v. Cheek*, 259 U.S. 530, 547 (1922).

Constitutional and Statutory Provisions Involved

This case involves the Fourteenth Amendment to the Constitution of the United States.

This case also involves §7-401(u) of the Philadelphia Home Rule Charter of 1951 mandating that Civil Service Regulations shall provide for:

> "*Such residence qualifications for employees in the civil service* as the Council may from time to time require but the Civil Service Commission may, upon

1. The foregoing municipal statutory provisions are encompassed by the language in §1257(2), referring to a "statute of any state." *King Mfg. Co. v. City Council*, 277 U.S. 100 (1928); *Jamison v. Texas*, 318 U.S. 413, 414 (1943); *Independent Warehouses, Inc. v. Scheele*, 331 U.S. 70, 79 (1947).

the request of the Personnel Director, waive any such requirements whenever, in its discretion, the circumstances warrant such waiver." (emphasis added).

With respect to Civil Service employees, §20-101 of the Philadelphia Code of Ordinances provides in pertinent part:

> "(2) *Every employee in the civil service shall maintain his bona fide residence in the City.* The City Controller may require proof of the residence of any employee in the civil service." (emphasis added).

Philadelphia Civil Service Regulation 30.01 further provides in relevant part:

> "30—*RESIDENCE REQUIREMENT*
>
> *REQUIREMENTS.* An Ordinance of Council, Bill 79, effective April 16, 1953, enacted pursuant to authority of Section 7-401(u) of the Charter, requires each employee to have been a bona fide resident of the City for a period of one (1) year prior to his appointment and after appointment to maintain his bona fide residence in the City, unless such residence requirement is waived by the Commission."

Questions Presented

Whether §7-401(u) of the Philadelphia Home Rule Charter of 1951; §20-101 of the Philadelphia Code of Ordinances, and Philadelphia Civil Service Regulation 30.01, requiring all city employees to be residents of the said city for the duration of their employment, contravene appellant's fundamental right to travel interstate and violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Whether appellant was denied due process of law under the Constitution of the United States at the Philadelphia Civil Service Commission Hearing, where he was denied the right to confront and cross examine the alleged informants.

Whether appellant was denied due process of law under the Constitution of the United States at the Philadelphia Civil Service Commission Hearing, where adverse hearsay testimony contained in an investigation report was received and considered by the Philadelphia Civil Service Commission in establishing appellant's alleged non-residence.

Whether the decision of the Philadelphia Civil Service Commission terminating appellant's employment for failing to maintain a *bona fide* residence in the City was arbitrary and capricious, and not supported by substantial evidence.

Statement of the Case

A. *Factual Background.* Appellant, Francis McCarthy, a lieutenant in the Philadelphia Fire Department, was dismissed from his position with the City of Philadelphia on February 2, 1973, after 16 years of service. Appellant was charged with violating §7-401(u) of the Philadelphia Home Rule Charter of 1951; §20-101 of the Philadelphia Code of Ordinances, and Philadelphia Civil Service Regulation 30.01. In effect, these statutes impose a residency requirement upon all Civil Service employees of the City of Philadelphia to reside therein for the duration of their employment by the City. A brief background of the underlying factual situation is necessary to illuminate the issue before the Philadelphia Civil Service Commission and the issues presented by this appeal. It is undisputed that prior to November 1971, appellant's residence was in the City of Philadelphia, where he lived with his wife and 9 children. Neighborhood violence, resulting in the beatings of appellant's children, caused appellant's wife to move, with the children, to the family's summer house in New Jersey. Lieutenant McCarthy remained in the Philadelphia house until September, 1972. Because of vandalism to his house, appellant sold this home and moved into his mother's house in Philadelphia. He continued to live there until he was dismissed from the Fire Department. Hence, the ultimate factual issue confronting the Philadelphia Civil Service Commission was whether Lieutenant McCarthy was a *bona fide* resident of the City of Philadelphia.

Upon timely appeal to the Philadelphia Civil Service Commission, a hearing was held on June 19, 1973. The only evidence offered by the City was the report of the Fire Department Investigator containing hearsay information and conclusions on the issue of appellant's disputed residency, based upon interviews conducted by the investigator. On August 6, 1973, appellant was notified that the Civil Service Commission had found appellant not to be a *bona fide* resident of Philadelphia.

Appellant filed a timely appeal to the Court of Common Pleas of Philadelphia County, and, on May 6, 1974, that Court affirmed the decision of the Philadelphia Civil Service Commission, based solely upon a review of the record made before the Civil Service Commission.

Appeal was taken to the Commonwealth Court of Pennsylvania, which affirmed the decision of the Court of Common Pleas of Philadelphia County on May, 1975. Upon timely appeal to the Supreme Court of Pennsylvania, appellant's Petition for Allocatur was denied.

Substantial Federal Grounds Exist for Granting Plenary Hearing

I. Section 7-401 (u) of the Philadelphia Home Rule Charter of 1951; §20-101 of the Philadelphia Code, and Philadelphia Civil Service Regulation 30.01 are unconstitutional as violative of appellant's right to travel interstate and right to equal protection under the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

A. *The statutes unlawfully penalize appellant's right to travel interstate.* The right to travel in an unrestricted manner was recognized early by this Court. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867). This Court has recently struck down several durational residency requirements for eligibility for government benefits, as violative of the right to travel. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (non-emergency hospital and medical services); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (welfare benefits); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (voting rights). These cases clearly establish that this migratory right is a "fundamental right" and that any law which infringes upon the right can be justified only by a "compelling governmental interest." *Shapiro v. Thompson*, *supra* at 634. It is respectfully submitted that the residency

requirement involved herein similarly infringes unlawfully upon the right to travel.

The durational residency requirements above, like the employment residency requirement at bar, utilized residency to condition the receipt of governmental benefits. Although the former operate to *exclude*, while the latter acts to *include* persons in a given jurisdiction, the effect upon the right to travel is the same. In both situations, a penalty or chill is imposed upon the individual's freedom to travel (with the intent to reside indefinitely). The durational residency requirement penalizes via exclusion, whereas the employment residence requirement penalizes via inclusion. To have meaning, this right to travel must be two-fold—embracing the right to travel *to* somewhere as well as the right to travel *from* somewhere, without an unconstitutional deprivation of governmental benefits. These two rights are necessarily interwoven and interdependent since the right to travel "to" somewhere presupposes the right to travel "from" somewhere.

This Court has yet to pass upon the constitutionality of residency requirements for municipal employment,[2] and lower courts, both state and federal, are divided upon the issue.[3]

2. This Court dismissed the appeal from a state court for want of a federal question in *Detroit Police Officers Ass'n v. City of Detroit*, 405 U.S. 950 (1972), *dismissing appeal from* 385 Mich. 519, 190 N.W.2d 97 (1971). The appellant's attack there rested more upon allegations that the residency requirement violated the *right to live* where one chooses, rather than upon the traditional right to travel asserted herein.

3. Residency requirements for municipal employment were held to violate the fundamental right to travel in the seminal case of *Donnelly v. City of Manchester*, 111 N.H. 50, 274 A.2d 789 (1971); *Fraternal Order of Police v. Hunter*, 36 Ohio Misc. 103, 65 Ohio Op. 2d 144, 303 N.E.2d 103 (1973). *Cf. Krzewinski v. Kugler*, 338 F.Supp. 492 (D. N.J. 1972), (recognizing the infringement, but finding a compelling state interest in justification thereof). Other courts have held in favor of such residency requirements. *Wright v. City of Jackson*, 506 F.2d 900 (5th Cir. 1975); *Ector v. City of Torrance*, 10 Cal. 3d 129, 514 P.2d 433, 109 Cal. Rptr. 849 (1973), *cert. denied*, 415 U.S. 935 (1974); *Abrahams v. Civil Serv. Comm'n*, 65 N.J. 61, 319 A.2d 483 (1974).

The divergence of opinion in the lower courts apparently stems from varying interpretations given to this Court's statements in *Shapiro* and *Dunn*, and again in *Memorial Hospital*, that the foregoing decisions were "not intended to 'cast doubt on the validity of appropriately defined and uniformly applied bona fide residence requirements.'" *Memorial Hospital, supra*, at 255 *quoting Dunn v. Blumstein, supra* at n. 13.

Both the California Supreme Court in *Ector v. City of Torrance*, 10 Cal. 3d 129, 514 P.2d 433, 109 Cal. Rptr. 849 (1973), *cert. denied*, 415 U.S. 935 (1974), and the New Jersey court in *Abrahams v. Civil Service Commission*, 65 N.J. 61, 319 A.2d 483 (1974) have interpreted this language to mean that the right to travel was not fundamental as it related to municipal employment residency requirements. Your appellant respectfully submits that this language referred *not* to the status of the right as being fundamental, but rather referred to the question of whether such bona fide residency requirements, unlike the invalidated durational requirements, might be justified by a compelling state interest. The courts in *Ector* and *Abrahams* also thought the right to travel was limited by the interstate-intrastate distinction. *See Shapiro, supra; Memorial Hospital, supra*. The status of this problem should not affect the application of the residency requirements at bar, since the alleged change in residency by the appellant was in fact *interstate*, i.e. from Pennsylvania to New Jersey.[4] This factor distinguishes this case from the application of a residency requirement on an *intrastate* basis. See *Wright v. City of Jackson*, 506 F.2d 900 (5th Cir. 1975).

The Commonwealth Court of Pennsylvania rejected appellant's right to travel claim, placing sole reliance upon *Wright v. City of Jackson, supra*. The nonresidents in *Wright* challenged the residency requirement only as violative of the intrastate right to travel. *Id.* at 901-02.

4. The City of Philadelphia is bordered by the State of New Jersey and it is within a few miles of the State of Delaware. It can not be disputed that a high number of persons commute interstate daily from both of these states to work in Philadelphia.

The penalty imposed upon appellant in the instant case is for his alleged exercise of an interstate right to travel, with the resultant deprivation of his right to earn a livelihood. The questioned statutes further chill the right to travel of other municipal employees, a situation heightened by the problems involved in securing civil service or related employment in a new location.

B. *The statutes are not justified by a compelling state interest.* The Commonwealth Court, in its decision below, while relying upon *Wright*, never enunciated *any reasons* justifying the infringement of appellant's right to travel—be they compelling or just rationally related to a legitimate state purpose. There are apparently two possible theories of state interest in such residency requirements: (1) "public coffer" theory (rationale is preservation of municipality fisc via tax money use to benefit residents); (2) "interest in the community" theory. Both theories have been rejected as impermissible justifications for a durational residency requirement, *Shapiro v. Thompson*, *supra* at 632-3. Further, it is at least arguable that these theories may not even satisfy the rational relationship test in the present case. It defies logic to argue that the requirements further a goal of geographic proximity, since firemen lving in Northeast Philadelphia and working in Southwest Philadelphia may have residences farther from their places of work than many firemen living in New Jersey and Delaware. Residency, as a means of qualifying persons for public employment, does not bear a rational relationship to the state interest of having the best qualified people performing public services for its citizens. *See, e.g., Hanson v. Unified School District No. 500*, 364 F. Supp. 330 (D. Kan. 1973).

The opinions of the courts below contain no satisfactory answer to appellant's contention that the residency requirement is neither justified by a compelling state interest, nor rationally related to legitimate state objectives.

C. *The statutes deprive appellant of equal protection under the law.* The right to work is the very essence of personal freedom and opportunity, which the Fourteenth Amendment was adopted to secure. *Truax v. Raich*, 239 U.S. 33 (1915). Though not explicitly denominated as a "fundamental" right by this Court, the right to work has been recognized as an essential right. *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952); *Hanson v. Unified School District No. 500*, 364 F.Supp. 330 (D. Kan. 1973). It is submitted that the municipal employment residency requirement is an *arbitrary* wall erected around the city's boundaries which denies to non-residents of the city equal protection under the law. Where the right to work is further coupled with the appellant's right to travel, any infringement thereupon should be justified only by compelling state interests. It was this coupling of rights effect that arguably led to the elevation of the right to travel to "fundamental" status.[5] Appellant's views respecting the lack of any justifiable reason for the imposition created by the statutes at bar are fully set forth in Section B, *supra*.

This appellant does not challenge the power of the state to prescribe the qualifications of its *officers* to preserve the basic concept of a political community. *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973). However, this power applies only to

> "persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." *Id.*

Accordingly, although this Court found that citizenship bore a rational relationship to the special demands of

5. In *Shapiro v. Thompson*, *supra*, the right to travel was coupled with deprivation of "necessities of life"; *Dunn v. Blumstein*, *supra*, involved both the right to travel and the right to vote.

such defined, official positions, the Court, however, found "little, if any, relationship" between citizenship and non-policy-making jobs. *Id.* at 642. It is submitted that the residence requirement similarly bears "little, if any, relationship" to non-policy-making jobs; as is the job of appellant. The analysis in *Sugarman*, involving exclusion of aliens, should be applicable to the present case, since here too, the all-encompassing residency requirement is not narrowly tailored, but rather it sweeps in *all* municipal employees without regard to occupation, or to any relationship which the individual occupation may have to city residence.

II. Appellant was denied due process of law at the Philadelphia Civil Service Commission Hearing when he was denied the right to be confronted by and to cross examine his accusers.

The question posed by the above statement is often phrased as "what process is due the appellant?" It is clear that some form of notice and a hearing is required in every case involving a deprivation of property within the purview of the due process clause. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Goss v. Lopez*, 419 U.S. 565 (1975). Appellant respectfully submits that the hearing afforded by the Philadelphia Civil Service Commission in the present case does not satisfy the due process hearing requisites established by this Court.[6]

6. It is uncontested that the termination of appellant's employment, while under employment contract, and after sixteen years of fire department service, was deprivation of an important property right. *See Perry v. Sindermann*, 408 U.S. 593 (1972). In any case, the hearing to which this Court's attention is referred took place on June 19, 1973, more than 4 months after appellant's dismissal. It should be noted, therefore, that the problems posed by a pretermination hearing (such as protecting the public fisc from further payments on a public employment contract) are not present in the instant case.

The ultimate factual issue in this case was the location of appellant's residence. All evidence introduced by the Fire Department with respect thereto was through the Fire Department's personnel director, who relied upon an investigative report of another official, Chief Joseph J. Cody, whose report contained accusatory statements allegedly made in a letter and in interviews with appellant's wife's New Jersey neighbors. Appellant was denied the right to confront and cross-examine both his accusers, and Cody, the investigator. The Department's evidence was all introduced "third hand," and, therefore, the appellant was not afforded an adequate opportunity for rebuttal. This Court has stated that

> "[i]n almost every setting where important decisions turn on *questions of fact*, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (emphasis added).

As aforementioned this case turns upon adjudicative facts. In discussing the right of confrontation and of cross-examination in *Wolff v. McDonnell*, 418 U.S. 539 (1974), this Court stated that "[t]hese procedures are essential . . . where a person may lose his job in society." *Id.* at 567, *citing Greene v. McElroy*, 360 U.S. 474, 496-97 (1959). *Greene* further stated that:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that *where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings*, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindic-

> tiveness, intolerance, prejudice, or jealousy. We have formalized these *protections in the requirements of confrontation and cross-examination*. They have ancient roots. They find expression in the Sixth Amendment. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also *in all types of cases where administrative . . . actions were under scrutiny*. *Id.* at 496-97 (emphasis added).

See also Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193, 212-14 (1956). Unlike the situation in *Wolff*, *supra*, the rights of confrontation and cross-examination in the instant case create no potential problem of institutional discipline. Neither is this a case where the inquiry focuses upon independently ascertainable objective facts. *Cf. Richardson v. Perales*, 402 U.S. 389 (1971). Rather, the factual inquiry here deals with adjudicative facts, determinations of which necessarily hinge upon the veracity of the witnesses. It is in this type of situation where this Court has held that the procedural safeguards of the right of confrontation and of cross-examination are mandatory. *Goldberg*, *supra*.

Procedural requisites for a due process hearing have been determined by balancing the interests of the state against the private interest affected by governmental action. *Goldberg*, *supra* at 263; *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). It is submitted that, in the instant case, the interest of the individual in continuing his livelihood is a necessity, whereas the state's interest is minimized by the nature and timing of the hearing. *See* note 6, *supra*. Given such a balance, and the fact that the evidence in question is probative of the ultimate adjudicative facts in the proceeding, appellant submits that due process requires that he be afforded the rights of confrontation and cross-examination.

Since this Court's decision in *Goldberg*, *supra*, the scope of procedural safeguards necessary to satisfy the requisites of procedural due process have fluctuated, thus granting lower courts a range of decision in this area. *See*

Goss v. Lopez, 419 U.S. 565 (1975); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *cf. North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972). However, although formality and procedural requisites for the hearing can vary, *Boddie v. Connecticut*, 401 U.S. 371 (1971), your appellant submits that the variance in the case at bar falls far short of the due process mandate.

A. *An order based upon hearsay regarding the ultimate factual issue is violative of due process and principles of fundamental fairness.* In the majority opinion of the Commonwealth Court it is stated that the Court relied upon the appellant's evidence in its decision. *McCarthy v. Philadelphia Civil Service Commission*, 339 A.2d 634 (1975). The Court stated:

> "The testimony further discloses that appellant, depending on his work schedule, would usually spend two nights a week at his fire station, at least two nights a week at his mother's home, and two to three nights a week in Villas, New Jersey."

Id. at 636. This statement of the Court is without support in the record. Appellant testified that he spent "maybe two days a week at the most, sometimes a lot less" at Villas, New Jersey. The Court was relying upon findings made by the Philadelphia Civil Service Commission. Since the testimony of all witnesses with personal knowledge contradicts the Commission's finding, the only evidence the Commission could have relied upon in reaching its decision had to be contained in the *hearsay* statements of the interviewed witnesses. (located in the Fire Department's investigative report).[7]

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7. This problem is integrally related to that discussed earlier, regarding the rights of confrontation and cross-examination. It is, of course, the presence of the hearsay in the case at bar which renders the aforementioned rights essential in this context. The combined problem of hearsay and confrontation and cross-examination rights can be treated as one issue. *See Goldberg v. Kelly*, *supra*; *Richardson v. Perales*, 402 U.S. 389 (1971).

The seminal decision, treating the status of hearsay in administrative proceedings, was set forth by this Court in *Richardson v. Perales*, 402 U.S. 389 (1971). In *Richardson*, the requirements of *Goldberg v. Kelly, supra*, regarding cross-examination and confrontation rights were clarified. Stating that the hearsay in *Richardson* was *not* of questionable credibility or veracity, but rather was of a type recognized for its reliable and probative worth, it was held that such hearsay could satisfy the substantial evidence standard. *Richardson, supra* at 405-07.[8]

Appellant respectfully submits that, unlike the *Richardson* situation, the case at bar *does* involve issues of credibility and veracity, and therefore, the procedural safeguards mandated by *Goldberg v. Kelly* are more apposite. Furthermore, the hearsay in the present case is not of a traditionally reliable type, but is of a traditionally unreliable type, *i.e.*, rumors from one's neighbors. The application of *Goldberg* and *Richardson* to this issue is perhaps not dichotomous, though lower courts are apparently struggling with the distinctions. *Cf. Bleilevens v. Pennsylvania Civil Service Commission*, 11 Pa. Cmwlth. Ct. 1, 312 A.2d 109 (1973); *see generally* 36 A.L.R. 3d 12 (1971). If given the opportunity, appellant will argue before this Court that the combined effect of the hearsay reports with appellant's total inability to cross-examine or to confront the adversary's witnesses violated due process and principles of fundamental fairness as outlined by this Court in *Goldberg v. Kelly* and *Richardson v. Perales*.

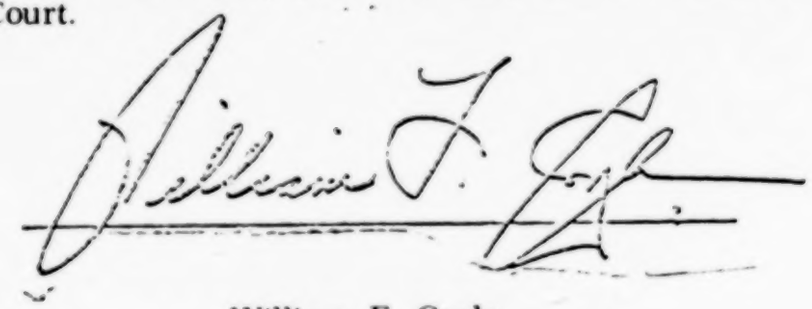
B. *The competent evidence does not constitute substantial evidence in support of the Philadelphia Civil Service Commission's decision.* From the proceeding below, it remains uncontested that the burden of proof in this case was upon the Fire Department to prove a change in appellant's residence. Based upon the foregoing discussion, your appellant believes that all of the competent evidence

8. The hearsay held reliable in *Richardson* was contained in medical reports. *Cf. In Re Appeal in Maricopa County*, 111 Ariz. 588, 536 P.2d 197 (1975).

in this case weighs against the Fire Department. Further, the Department's uncorroborated hearsay testimony and evidence contained in the investigation report were not of a reliable kind as was present in *Richardson v. Perales*. Appellant submits therefore that the statement of Mr. Chief Justice Hughes in *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938) is on point: "mere uncorroborated hearsay or rumor does not constitute substantial evidence." *Id.* at 230. In the present case, appellant does not deny that after being terrorized, his wife and 8 of his 9 children moved from Philadelphia to a summer house in New Jersey. Appellant does assert, however, that he remained in Philadelphia with the intent to maintain his residence there, especially in view of the city's residency requirement. Though appellant candidly admits frequent visits with his family in New Jersey, there is no evidence, save for the uncorroborated hearsay and rumors of neighbors, that the appellant ever changed his residence. The Civil Service Commission's decision based upon such hearsay is arbitrary and capricious, and unsupported by substantial evidence.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the questions presented by this appeal are substantial, and that they justify plenary consideration by this Court.



William F. Coyle
Attorney for Appellant
1430 Land Title Building
Philadelphia, Pennsylvania 19110

APPENDIX A

Philadelphia Civil Service Commission Decision

Appendix A

Opinion of Civil Service Commission

CIVIL SERVICE COMMISSION
City of Philadelphia

Appeal of
Francis McCarthy.
Case No. 1517 S&D.

Appeal under Regulation 17 heard.

June 19, 1973, 3:00 p.m., 620 Municipal Services Building.

Before: George Bucher,
Leonard L. Ettinger,
Harrison J. Trapp,
Commissioners.

Appearances

James J. Kerwick, Esq., Assistant City Solicitor,
on behalf of Fire Department.
William F. Coyle, Esq., on behalf of Appellant.

This is an appeal under Civil Service Regulation 17.061 from the suspension and dismissal of appellant from his position of Fire Lieutenant, effective February 2, 1973, the assigned causes being:

> "A Department investigation indicates that although you alleged to reside at the home of your mother at 6927 Chester Avenue, Philadelphia, Pa., you in fact are the co-owner, along with your wife, of a house at 164 E. Atlantic Avenue, Villas, New Jersey. The investigation further indicates that you sold your Philadelphia home at 5553 Greenway Avenue in

> September, 1972 and that you[r] wife lives at and votes from the Villas, New Jersey address, your children attend local schools in Villas, New Jersey, and you are still maintaining a marriage relationship. This is in violation of Section 7-401 of the Home Rule Charter, and Section 20-101 of the Philadelphia Code, and Civil Service Regulation 30.01."

At the hearing before the Commission June 19, 1973 appellant did not dispute the accuracy of the charges contained in the Notice of Dismissal. However, he maintained that, in spite of these facts, he was in fact residing at 6927 Chester Avenue and only spent weekends or time between tours in New Jersey. Appellant presented testimony which set forth the causes for the sale of his Philadelphia Home and the relocation of his wife and children in New Jersey. In addition, appellant presented the testimony of his mother and various records to indicate that he was residing at 6927 Chester Avenue.

Appellant submitted a lengthy memorandum of law, and we have also thoroughly considered a Memorandum of Legal Advice from the City Solicitor dated August 4, 1970 designed to serve as a guideline for determining the residence of city employees. The facts before us present what can only be called a border-line situation.

We have considered the evidence presented in light of the scheduling of Fire Department tours. We note that, on the average, a fireman spends two nights a week at his duty station. If appellant spends his "weekends" in New Jersey, he spends as much time, on the average, in New Jersey as he does at his parent's home on Chester Avenue. In other words, appellant spends no more than two to three nights a week at his alleged residence in Philadelphia. Considering the evidence presented in this light, we are compelled to conclude appellant is not a bona fide resident of Philadelphia.

Accordingly, this appeal is denied, and we so certify to the Personnel Director and the appropriate authorities.

George Bucher,
Leonard L. Ettinger,
Harrison J. Trapp,
Commissioners.

August 3, 1973.

APPENDIX B

**Court of Common Pleas of Philadelphia County—
Memorandum Opinion**

Appendix B

Memorandum Opinion

(Filed August 8, 1974.)

COURT OF COMMON PLEAS

Francis McCarthy,
vs.
Philadelphia Civil Service Commission.

August Term, 1973.
No. 1479.

Francis McCarthy was served with notice of the Philadelphia Fire Commissioner's Intention to Dismiss effective ten days from January 27, 1973, and with notice of his suspension without pay, effective January 22, 1973. He was charged with violation of the Home Rule Charter of 1951 in not maintaining a bona fide residence within the City of Philadelphia, as is required of all City employees. McCarthy responded to the charges, and a hearing was held before the Civil Service Commission on June 19, 1973. On August 3, 1973, the Commission denied McCarthy's appeal from his dismissal and suspension. The case is presently before this Court on appeal from the decision of the Civil Service Commission.

Section 7-401(u) of the Home Rule Charter provides that Civil Service regulations shall provide for:

> "Such residence qualifications for employees in the civil service as the Council may from time to time require but the Civil Service Commission may, upon the request of the Personnel Director, waive any such requirements whenever, in its discretion, the circumstances warrant such waiver;"

With respect to Civil Service employees, Section 20-101 of the Philadelphia Code provides:

> "Section 1. No person shall hereafter be appointed as an employee in the Civil Service of the City unless he shall have been a bona fide resident of the City for at least one year prior to his appointment.
>
> Section 2. Every employee in the Civil Service of the City shall be required to maintain his bona fide residence in the City during the continuance of his employment by the City. The City controller may from time to time require proof of the bona fide residence of any employee in the Civil Service of the City."

The Civil Service Commission found that the evidence showed that the appellant was not a bona fide resident of Philadelphia.

The record showed that the appellant lived in Philadelphia all his life. He and his wife and children resided at 5553 Greenway Avenue in Philadelphia. After certain incidents in the neighborhood, his wife and children moved to a home the McCarthys previously owned at 164 E. Atlantic Ave., Villas, New Jersey. The appellant continued to live at 5553 Greenway Avenue with his oldest son. However, while he was at work, the house was continually subject to vandalism. He sold the house in September, 1972, and went to live with his mother at 6927 Chester Avenue in Philadelphia, a house in which she had previously lived alone. He still lives there, votes there, and receives mail there. His wife and children live in Villas, New Jersey. His wife votes there and his children attend school there. The record indicates that while the appellant was working, he spent two or three nights a week in Villas. It appears that appellant worked two ten-hour days and two fourteen hour nights each week. When he had at least two days in a row free, he would go to Villas.

This Court's scope of review of decisions of the Civil Service Commission is limited by the Local Agency Law, 53 P.S. §11308, to questions of appellant's constitutional rights, errors of law, procedural irregularities, and lack of

substantial evidence to support the findings of the administrative agency. *Harrington vs. Philadelphia Civil Service Commission*, 4 Commonwealth Ct. 580, 287 A.2d 912 (1972). Therefore, because of this limited scope of review, this Court cannot substitute its opinions for those of the Civil Service Commission, but must only decide whether the Commission acted capriciously, in bad faith, without substantial evidence, or in abuse of its powers.

The appeal is apparently based on (1) appellant's claim that the Commission's definition of "bona fide resident" was incorrect and amounted to an error of law, and (2) appellant's claim that the finding that he was not a bona fide resident of Philadelphia was not substantiated by the evidence.

The definition of "bona fide resident" adopted by the Civil Service Commission in the present case is that of legal resident or domiciliary. This embodies the concept of actual residence at a place coupled with intent to remain. This definition is in conformity with that in a memorandum on the subject of what constitutes bona fide residence issued by the Law Department of the City of Philadelphia. Expressly rejected is the definition under which a person may have two or more residences, each being a place at which he lives at certain times.

The ordinance itself does not define the expression "bona fide resident". As appellant points out, the only available relevant legislative history is found in correspondence between the Mayor and City Council President at the time. From the letter of the City Council President, it seems clear that the purpose of the ordinance was to insure that the employees of the City have a true commitment to Philadelphia. The requirements of legal residence or domicile with intent to remain conform with this type of commitment. Therefore, the Civil Service Commission was correct in adopting the definition propounded by the Law Department.

It is then up to this Court to determine whether the facts substantiate the Commission's finding that the appellant was not a bona fide resident of the City after the sale of his home at 5553 Greenway Avenue. The Pennsylvania Supreme Court has set forth various criteria to be considered in determining the location of a person's legal residence, such as where the family lives and eats, where children attend school and the amount of time spent at a particular location. *Stabile Registration Case*, 348 Pa. 587, 36 A.2d 451 (1944), *Dorrance's Estate*, 309 Pa. 151, 163 A.303 (1932). In the present case, these factors all go against the appellant. It is true that the appellant votes from his Chester Avenue address and uses that address for his automobile registration and driver's license. However, the Commission also considered that the appellant and his wife, although physically separated, were not estranged, and that he spent about half his nights in New Jersey. Furthermore, the Commission was entitled to consider the nature of the appellant's "residence" in Philadelphia. *Dorrance's Estate, supra*. His whole family resided in a home he owned jointly with his wife in New Jersey, and he moved in with his mother and stayed at her house between his working days. Although there is evidence both favoring and opposing the position of the appellant, it is clear that there is substantial evidence to support the finding of the Commission.

Since the appellant has shown neither error of law nor lack of substantial evidence, this Court, pursuant to 53 P.S. §11308, will affirm the decision of the Civil Service Commission.

Accordingly, it is therefore

ORDERED AND DECREED that the decision of the Civil Service Commission is affirmed and the appeal is dismissed.

BY THE COURT:
HIRSH, *J.*

Date: 8/8/74.

APPENDIX C

Commonwealth Court Decision

Appendix C

IN THE
COMMONWEALTH COURT OF
PENNSYLVANIA

No. 730 C.D. 1974

Francis McCarthy, *Appellant*

v.

Philadelphia Civil Service Commission, *Appellee*

Before: Honorable James S. Bowman, President Judge
Honorable James C. Crumlish, Jr., Judge
Honorable Harry A. Kramer, Judge
Honorable Roy Wilkinson, Jr., Judge
Honorable Glenn E. Mencer, Judge
Honorable Theodore O. Rogers, Judge
Honorable Genevieve Blatt, Judge

Argued: April 1, 1975

OPINION

Opinion by Judge Wilkinson, May 30, 1975.

This appeal involves the in-city residency requirement of civil service employees of the City of Philadelphia as contained in §20-101 of that City's Code of Ordinances.[1] Francis McCarthy, appellant, was suspended and dismissed effective February 2, 1973, from his position as Fire

1. Section 2 of that ordinance reads: "Every employee in the Civil Service of the City shall be required to maintain his bona fide residence in the City during the continuance of his employment by the City. . . ."

Lieutenant because he was in violation of the residency requirements contained in the Philadelphia Home Rule Charter, Code of Municipal Ordinances and Civil Service Regulations. Appellant filed a timely appeal to the Philadelphia Civil Service Commission, which found, after a hearing, that appellant was not a bona fide resident of Philadelphia. On further appeal to the Court of Common Pleas of Philadelphia County, that court, without taking additional evidence, affirmed the decision of the Civil Service Commission. The instant appeal followed.

The record shows that appellant and his family owned property both in Philadelphia and in Villas, New Jersey. After certain incidents had occurred in the neighborhood of appellant's Philadelphia property, appellant's wife and nine of their ten children moved to the New Jersey property. Appellant and his oldest son continued to live in the house in the City for approximately ten months until the property was sold, because the house was continually subject to vandalism. Appellant then went to live with his mother in Philadelphia where he remained at least up to the time of his dismissal. It is his mother's home that appellant claims as his in-city residence in that he alleges he resides there while on duty, receives mail there, is registered to vote from that address, and uses that address for various financial purposes.

The testimony further discloses that appellant, depending on his work schedule, would usually spend two nights a week at his fire station, at least two nights a week at his mother's home, and two to three nights a week in Villas, New Jersey. Appellant's wife votes in New Jersey and his children attend school there. Appellant does not contest that he was still maintaining a marital relationship with his wife and that he is the sole support for his family.

When, as here, the lower court took no additional evidence, the review by this Court is to determine whether constitutional rights were violated, whether the local

agency abused its discretion or committed an error of law, and whether the findings are supported by substantial evidence. *See City of Philadelphia v. Evans*, 14 Pa. Commonwealth Ct. 1, 320 A.2d 418 (1974), and *Shannon v. Civil Service Commission*, 4 Pa. Commonwealth Ct. 492, 287 A.2d 858 (1972).

Appellant argues the requirement that city employees be residents of the City is unconstitutional, because it infringes upon appellant's right to travel and violates the Equal Protection clause of the 14th Amendment of the United States Constitution. This very issue was raised and fully discussed in *Wright v. City of Jackson, Mississippi*, 506 F.2d 900 (5th Cir., 1975). There, the Fifth Circuit Court of Appeals held that a municipal residency requirement for firemen did not violate the "right to travel" nor any provision of the Federal Constitution. That court also determined that "numerous other decisions . . . have held that a municipal employee residence requirement bears a rational relationship to one or more legitimate state purposes, and hence is constitutional under the traditional equal protection test. [citing cases]." 506 F.2d at 903. In light of the complete review of this issue in the above opinion, it is unnecessary for us to pass further on the Federal questions raised.

Appellant next argues that the admission and use by the Commission of hearsay testimony in the form of various reports and statements was an error of law and tainted the Commission's findings. We disagree. Section 5 of the Local Agency Law, Act of December 2, 1968, P. L. 1133, 53 P. S. §11305, provides that local agencies shall not be bound by technical rules of evidence. This Court has held in *Bleilevens v. Pennsylvania Civil Service Commission*, 11 Pa. Commonwealth Ct. 1, 312 A.2d 109 (1973), that hearsay evidence can be admitted, but that an adjudication cannot be founded entirely on hearsay. In the instant case, it is clear that the Commission based its decision, not on the hearsay complained of, but on the testimony of appellant himself concerning how much time he spends in New Jersey and Philadelphia. Such action by the Commission does not constitute an error of law.

Appellant's final argument is that there was not substantial evidence to support the Commission's finding that appellant was not a bona fide resident of the City. It is well settled that a person can have more than one residence, but only one "legal residence" or domicile. *See Dorrance's Estate*, 309 Pa. 151, 163 A. 303 (1932), and *Goetz v. Borough of Zelienople*, 14 Pa. Commonwealth Ct. 639, 324 A.2d 808 (1974). In the instant case, the Commission and the lower court properly interpreted the term "bona fide residence" as used in the ordinance to mean domicile. *Alburger v. Alburger*, 138 Pa. Superior Ct. 339, 10 A.2d 888 (1939). The conclusion of where one's domicile is depends on the facts of each individual case. *Stabile Registration Case*, 348 Pa. 587, 36 A.2d 451 (1944), and *Goetz, supra*.

Here, the Commission determined that appellant's New Jersey residence was his domicile. In support of this conclusion, the record shows: that appellant no longer owned property in Philadelphia; that appellant spent on the average as much time in New Jersey as he did at his mother's home in Philadelphia; that appellant continued to maintain a marital relationship with his wife while she lived in New Jersey on property co-owned with appellant; that appellant was the sole support of his wife and family living in New Jersey; that appellant's children attended school in New Jersey. These well-supported facts fully substantiate the conclusion that the domicile of appellant was in New Jersey, and we are bound by the facts supported by substantial evidence and proper conclusions of law made by the Commission.

This seems to be a case where appellant has made a declaration of domicile, yet did not act in accordance with the declaration. In such a situation, the self-serving declaration cannot be conclusive but must yield to the intent which the acts and conduct of the person clearly indicate. *See Dorrance's Estate, supra*.

Affirmed.

/s/
Roy Wilkinson, Jr., *Judge*

Appendix C

DISSENTING OPINION

Filed May 30, 1975

Dissenting Opinion by
Judge Crumlish, Jr.

I must respectfully dissent. Although I am in full accord with the majority's conclusion that the term "bona fide residence," as used in §20-101 of The Philadelphia Code, must be interpreted to require a "legal residence" or "domicile" within Philadelphia, and as construed that this requirement does not infringe upon Appellant's constitutional right to travel or equal protection, I cannot agree that there is substantial evidence to support the finding that Appellant is no longer a bona fide resident of the City.

"Bona fide residence" has been construed to mean a residence with domiciliary intent, i. e., a residence which an individual considers his home and where he intends to remain. Alburger v. Alburger, 138 Pa. Super. 339, 10 A.2d 888 (1939). While an individual may have many residences, he can have but one domicile. Goetz v. Borough of Zelienople, 14 Pa. Cmwlth. 639, 324 A.2d 808 (1974). It is equally well settled that once a domicile in one locality is established, the party alleging a change in domicile has the burden of proving 1) a residence in a new locality, and 2) an intention to remain there. *See* Dorrance's Estate, 309 Pa. 151, 163 A. 303 (1932); Alburger v. Alburger, *supra*. In the instant case, it is undisputed that prior to November of 1971 Appellant's domicile or "bona fide residence" was 5553 Greenway Avenue, Philadelphia. At this time, after repeated incidents of vandalism to the property and physical abuse inflicted upon their children by gangs in the area, Appellant's wife and nine of their children moved to a summer home which they had owned for a number of years in Villas, New Jersey. Appellant's description of this separation as well as his intention to remain in the City are unrebutted on this record:

> "Because of all these incidents, my wife said she was leaving. At that time I pleaded with her to stay, We had a house in the Villas. It was a summer house. I pleaded with her to stay. I have to work in the city. I have to live in the city. My wife said she was more interested in her children's life than in my job. . . ."

Appellant continued to live with his oldest son at the Greenway address until September of 1972, at which time he was forced to sell the house because of continued vandalism while he was at work. He thereafter moved to his mother's home at 6927 Chester Avenue, Philadelphia. The record is equally undisputed that Appellant lived at this address on his duty days; had his own room there; paid rent in kind by purchasing the household groceries and performing maintenance upkeep; was registered to vote at this address; received mail and his telephone was listed at this address; his auto was registered there as was his driver's license; he maintained his checking and savings account at a local branch; and attended church within five blocks of 6927 Chester Avenue. The only witness produced by the City could not definitely put Appellant at the Villas address at any time during the investigation of his residency. Yet, after his dismissal and with only a half-hour's notice, Appellant was found at 6927 Chester Avenue when fire officials came to retrieve his departmental firefighting gear.

The majority notes that the legal conclusion of where one is domiciled largely depends upon the facts of each individual case, and here the determinative facts are that Appellant's family lives in New Jersey; his children attend school there; he is not estranged from his wife; he continued to be the sole support of his family; and the Commission found that he "spends as much time, on the average, in New Jersey as he does at his parents' home on Chester Avenue." Although the place of his family's abode is a strong indicia of an individual's domicile. Stabile Registration Case, 348 Pa. 587, 36 A.2d 451 (1944), it is certainly not conclusive when the individual lives

apart from his family with an intent to retain a domicile elsewhere and this intent is substantiated by the individual's dominant conduct. Thus, the controlling factor in the instant case must be the amount of time spent by Appellant between the two residences. As previously indicated, the Commission found that Appellant spent on the average as much time in New Jersey as he did at his mother's home in Philadelphia. The only competent evidence on this record, however, is that Appellant spent no more than two days per week with his family in Villas on his days off, and often quite less. The Commission, nevertheless, reasoned that since Appellant spent two nights a week on duty at the fire station, he spent no more than three nights per week at his Philadelphia residence. This adroit analysis, however, overlooks the undisputed evidence that on his night duty days Appellant spent his free hours at his mother's home. Thus, I can only conclude that the Commission's finding on this point is unsupported by substantive evidence.

After carefully reading and re-reading this record, I cannot say that the City met its burden of proving a change of domicile by *Appellant*, as distinguished from his wife and family. To the contrary, the evidence reveals a man faced with the difficult decision of either quitting a job he had held and faithfully performed for some sixteen years, or living apart from his family in order to retain that job. It seems clear to me that Appellant was aware of the City's residency requirement, and, consonant with this knowledge, that he intended to retain his domicile in Philadelphia and did everything he could to effectuate this intent. The fact that his family lives in New Jersey and he stays with them on his days off does not, in my opinion, prove a change in domicile. We are not dealing here with a "paper" residence retained for voter registration or taxation purposes. Rather, the record here reveals objective conduct, going well beyond a mere declaration of domicile, which establishes that Appellant lives in Philadelphia and intends to remain there.

I would reverse the order of the court below and reinstate Appellant to his prior position.

/s/
James C. Crumlish, Jr., *Judge*

Judge Mencer joins in this Dissent.

APPENDIX D

Petition For Allowance of Appeal From the Commonwealth Court to the Supreme Court of Pennsylvania

Appendix D

IN THE
SUPREME COURT
OF PENNSYLVANIA
FOR THE EASTERN DISTRICT

Francis McCarthy,
Appellant
v. Allocatur Docket No.
Philadelphia Civil Service
Commission,
Appellee

Attorney No. 04669

PETITION FOR ALLOWANCE OF APPEAL
FROM THE COMMONWEALTH COURT TO THE
SUPREME COURT OF PENNSYLVANIA

To the Honorable, The Justices of the Said Court:

The Petition of FRANCIS MC CARTHY, by his attorney, William F. Coyle, respectfully represents:

1. Petitioner is Appellant in a cause which originated before the Philadelphia Civil Service Commission. After the Philadelphia Civil Service Commission dismissed Appellant's Appeal from Suspension and Dismissal, Appeal was taken to the Court of Common Pleas of Philadelphia County as of August Term, 1973, No. 1479. That Court affirmed the decision of the Philadelphia Civil Service Commission, and an Appeal was taken to the Commonwealth Court of Pennsylvania as of No. 730 Commonwealth Docket, 1974. The Commonwealth Court affirmed the decision of the Court of Common Pleas of Philadelphia County in a 5-2 decision filed on May 30, 1975, (with Judges Crumlish and Mencer dissenting). Copies of these opinions are attached hereto and marked Exhibit "A."

2. The facts of the case are as follows:

On January 27, 1973, Appellant, a Lieutenant in the Philadelphia Fire Department with 16 years service, was

notified by the Fire Commissioner that he intended to dismiss Appellant ten (10) days from January 27, 1973, and at the same time Appellant was notified that he was suspended without pay effective January 22, 1973, for allegedly violating the residency requirements for City employees as set forth in the Philadelphia Home Rule Charter, the Philadelphia Code of Ordinances and the Philadelphia Civil Service Regulations. After hearing, at which the City offered as evidence only the report of the Fire Department Investigator, the Philadelphia Civil Service Commission affirmed the action of the Philadelphia Fire Commissioner. The Civil Service Commission characterized the case as a "borderline situation." Lieutenant McCarthy filed an Appeal with the Court of Common Pleas of Philadelphia County. No additional testimony was offered before the Court, and the Court affirmed the decision of the Philadelphia Civil Service Commission. Thereafter, Appellant filed an Appeal to the Commonwealth Court, and on May 30, 1975, the Commonwealth Court, with two Judges dissenting, affirmed the decision of the Common Pleas Court.

3. The questions involved in this case are:

I. Whether the Philadelphia Civil Service Commission acted arbitrarily and capriciously by concluding that Appellant is not a "bona fide" resident of the City of Philadelphia, as required by the Philadelphia City Charter, the Philadelphia Code of Ordinances and the Philadelphia Civil Service Regulations.

II. Whether Appellant was denied due process of law at the Philadelphia Civil Service Hearing, where he was denied the right to be confronted by, and to cross examine his accusers, when the Philadelphia Civil Service Commission received and considered hearsay testimony of alleged informants.

III. Whether §7-401(u) of the Philadelphia Home Rule Charter of 1951, §20-101 of the Philadelphia Code of Ordinances, and Philadelphia Civil Service Regulation 30.01, requiring city employees to be residents of the said city, are unconstitutional because they infringe upon Appellant's right to travel and because they violate the Equal Protec-

tion Clause of the 14th Amendment of the United States Constitution.

4. The reasons for requesting Allowance of Appeal are as follows:

The Commonwealth Court and the Court below erred as a matter of law because the City failed to meet its burden of proving a change of domicile by the *Appellant*, as distinguished from Appellant's wife and family. (See Dissenting Opinion, Page 3).

To quote from the Dissenting Opinion:

". . . once a domicile in one locality is established the party alleging a change in domicile has the burden of proving

1) a residence in a new locality, and
2) an intention to remain there."

Since the Record shows Appellant lived in Philadelphia all his life, the burden was upon the City to prove that Appellant had changed his bona fide residence, i.e., his domicile.

The City has not met its burden. It was undisputed that prior to November, 1971, Appellant's domicile was the Greenway Avenue, Philadelphia address, where he lived with his wife and children.

Appellant testified that because of neighborhood trouble: gangs roaming in the neighborhood and his children being beaten, his wife became hysterical, and she told him she was not staying in this City any more. (R-41-a).

The following colloquy took place between Appellant and his counsel:

Q. So what did she do?
A. Because of all these incidents, my wife said she was leaving. At the time I pleaded with her to stay. We had a house in the Villas. It was a summer house. I pleaded with her to stay. I have to work in the City. I have to live in the City. My wife said she was more interested in her children's lives than in my job, and that she was —

Q. What did she do?
A. She took all the children and left and went down to the Villas to live." (R-44-a, 45-a).

Appellant then testified that he continued to live at the Greenway Avenue address with his oldest son until September, 1972, when he was compelled to sell the house because of vandalsim which occurred while he was working. He thereafter moved to his mother's home, at 6927 Chester Avenue, Philadelphia. (R-45-a)

As noted in the Dissenting Opinion, the Record is undisputed that Appellant lived at this address; that he had his own room there; paid rent in kind by purchasing the household groceries and performing maintenance upkeep; was registered to vote at this address, received mail, and telephone was listed at this address. His auto was registered there as was his driver's license. He maintained his savings and checking accounts at the local branch bank and attended church within three blocks of 6927 Chester Avenue. On cross examination, Appellant stated that from September, 1972, until his dismissal, he averaged two nights a week and *sometimes none* at the New Jersey address (R-52-a). Appellant's wife corroborated her husband that prior to 1971, she and her children lived with him at the Greenway Avenue home in Philadelphia (R-55-a). She was then asked why she moved to Villas, New Jersey. Her answer follows:

"Because of all the incidents that had happened in the City of Philadelphia, because of my children being beaten up, their bikes being stolen, and the last thing that happened was that one of the boys that was with my son was stabbed, and because my son went to court and testified and picked the boys out that had done it, he was told he was going to be the next one, so I told my husband, I said, "My children's lives are more important to me, and I am not staying here," and against my husband's wishes, I took my nine children and I moved to Villas." (R-56-a)

Appellant's wife corroborated Appellant to the effect that he remained at the Greenway address until the follow-

ing September (1972) when he moved to his mother's home. She testified that she sometimes saw her husband two times a week and at other times she would not see him at all. (R-56-a)

Appellant's mother, Agnes McCarthy, also corroborated the Appellant with regard to his living with her at 6927 Chester Avenue, Philadelphia: he had his meals there which she prepared for him; she saw him every morning and night when he was working, that he purchased the food, did his laundry and received mail as well as telephone calls. (R-58-a, 59-a)

John McCarthy, Appellant's oldest son, also corroborated the Appellant as to the residency at the Greenway Avenue address until the premises was sold in September, 1972, when he and his father moved to his grandmother's home at Chester Avenue, Philadelphia.

The City of Philadelphia offered no contradictory testimony, but relied solely on the Fire Department investigation.

It is settled that a domicile once shown to exist is presumed to continue until another domicile is affirmatively proved; and the burden is on one alleging a change of domicile to prove residence in a new locality and intention to make that his permanent home. *Smith v. Smith*, 364 Pa. 1 (1950); *Obici's Estate*, 373 Pa. 567 (1953); *Lesker Case*, 377 Pa. 411 (1954); *Publicker Estate*, 385 Pa. 403 (1956); and *DiMilia v. DiMilia*, 204 Pa. Superior Ct. 188 (1964).

In *Publicker*, this Court held that to effect a change of domicile there must be a concurrence of the following factors. (1) physical presence in the place where the domicile is alleged to have been acquired, and (2) an intention to make it his home without any fixed or certain purpose to return to his former place of abode.

In *Obici's Estate*, this Court referred to an excellent statement in *Lowry's Estate*, 6 Pa. Superior Ct. 143 (1897) concerning the quality and weight of evidence necessary to establish a change of domicile, as follows:

> "A change of domicile works such important consequences, both as to the status of the person and the distribution of his personal estate, that the burden of proving a change is upon the party alleging it, and this is not only under settled principles of public law, but under the fundamental rule of evidence that an established condition is presumed to continue. The presumption stands until overcome by proof and the proof must be clear and free from reasonable doubt. . . ." 6 Pa. Superior Ct. 143, 148.

In *DiMilia, supra*, our Superior Court said, quoting from *McCauley v. McCauley*, 184 Pa. Superior Ct. 361 (1957):

> '. . . Where a change of domicile is alleged the burden of proving it rests upon the person making the allegation. To constitute the new domicile two things are indispensable: First, residence in the new locality; and second, the intention to remain there. The change cannot be made except *facto et animo*.' 184 Pa. Superior Ct. 361, 366.

In *Lesker*, this Court said:

> To accomplish a change of domicile, there must be not only the *animus* to change but the *factum* as well. There must be an actual transfer of bodily presence from one place to the other. The *animus* and the *factum* do not need to be simultaneous, but until they coincide the change of domicile is not effected. In the law a domicile is as deep rooted as a tree and to transfer it from one location to another requires an operation as intensive as the digging up, loading, transportation, and replanting of an elm or maple.
>
> One almost conclusive criterion of domicile is the *animus* manendi. There must be the intention to *remain*. . . ." 377 Pa. 411, 419

Not only was there no clear proof by the City of Appellant's change of domicile, there was no proof. The Philadelphia Fire Department simply relied on its departmental report, that Appellant's wife and children were living in a jointly owned summer home in New Jersey, that the chil-

dren attended school in New Jersey, that the wife voted from the Jersey address, and that Appellant still maintains a marriage relationship. This report contained substantial hearsay allegations to which Appellant made timely objection, as stated hereinafter. It is settled that if a wife lives apart from her husband without being guilty of desertion, she can acquire a separate domicile. *Restatement-Conflict of Laws*, Sec. 26, Pocket Supplement, Pa. Annotations. There was no proof whatever that Appellant moved bag and baggage from Philadelphia to New Jersey. As a matter of fact, the uncontradicted evidence is to the contrary. After his wife left for New Jersey with the children, against his wishes, Appellant remained at the Philadelphia home living there with one of his sons for a period of ten months until the property was sold. He then moved with his son into his mother's home in Philadelphia where he had a separate room, slept, purchased most of the food, had his meals, did his laundry, and from which place he was a registered Philadelphia voter. He went to church three blocks away, banked at a Philadelphia bank eight to ten blocks away, continued to maintain his Pennsylvania automobile operator's license and his owner's registration and his charge accounts with Philadelphia department stores. He also received all of his mail at this Philadelphia address, including tax bills for the New Jersey real estate, which Appellant owned for many years before his wife moved to New Jersey. Hence, not only was there no proof, by the Philadelphia Fire Department that Appellant changed his domicile, but the testimony of Appellant and his witnesses overwhelmingly established that Appellant's domicile of origin remained in Philadelphia.

Since the City failed to meet its burden of proving change of domicile by Appellant, the Order of the Commonwealth Court should be reversed and remanded to the Court below with instructions to reinstate Appellant to his former position with the Philadelphia Fire Department.

Appellant respectfully calls the attention of this Court to *Goetz v. Borough of Zelionople*, 14 Pa. Commonwealth

639, 324 A.2d, 808 (1974) wherein it was held that a regulation requiring Borough policemen to maintain a full time residence in the Borough did not prohibit a policeman from having a second residence such as a vacation home, in addition to his local residence.

II. At the outset of the majority Opinion the Court stated:

> ". . . he [Appellant] alleges he resides there [at his mother's home] while on duty, . . ."

This is not so. Appellant has maintained at all times that he resided at his mother's home not only while on duty, but at all times. When Appellant "resided" just prior to his dismissal is the issue in this case. Appellant has never alleged that he resided at his mother's home *only while on duty*. It is Appellant's position, as it has always been, that he resided at all times at his mother's home just prior to his dismissal from the Fire Department. Appellant testified, and it was not controverted by any credible testimony or evidence offered by the Philadelphia Fire Department, that he resided at his mother's home, not only while he was on duty, but also at all other times.

III. In the majority Opinion it is stated:

> "The testimony further discloses that Appellant, depending on his work schedule, would usually spend two nights a week at his fire station, at least two nights a week at his mother's home, and two to three nights a week in Villas, New Jersey."

This statement of the Court is without support in the Record. As can be seen by a review of the Record at pages 39-a, 46-a, and 47-a, 52-a, and 53-a, Appellant testified that he spent "maybe two days a week at the most, sometimes a lot less," at Villas, New Jersey; that he spent an average of two nights, or "sometimes none," at the New Jersey address; that he did not go to New Jersey every time he had a day off; and moreover that there was no average of how

many nights a week he spent in New Jersey: "sometimes it was two; sometimes it was none, and sometimes it was three." Appellant respectfully suggests that the Commonwealth Court statement above quoted is without foundation in the Record before this Court.

IV. The majority Opinion cites the case of *Bleilevens v. Pennsylvania Civil Service Commission*, 11 Pa. Commonwealth Ct., 1 (1973), for the proposition that an administrative agency adjudication cannot be found entirely on hearsay. While that statement, as far as it goes, is accurate, nonetheless *Bleilevens* clearly held as follows:

> The Hearsay Rule is not a technical rule of evidence, but a basic, vital and fundamental rule of law which ought to be followed by administrative agencies at those points in their hearings when facts crucial to the issue are sought to be placed upon the record. Indeed, an adjudication of an administrative agency may not be founded wholly on hearsay evidence, although such evidence may be admitted in cases made out by circumstantial evidence, if not inconsistent with the undisputed facts, for the additional light it may throw on the matter. 11 Pa. Commonwealth Ct. 1, 5.

The instant case is obviously one in which the Philadelphia Civil Service Commission should have followed the Hearsay Rule, because the Fire Department's investigative report contained "facts crucial to the issue." Moreover, the hearsay facts contained in the Fire Department's report were "inconsistent with the undisputed facts," established by Appellant at that hearing.

The only evidence upon which the Philadelphia Civil Service Commission could have relied in reaching its decision, had to be contained in the hearsay statements of witnesses interviewed by the Philadelphia Fire Department. Inasmuch as the Commonwealth Court's statement of facts set forth hereinabove is not supported by the record, Appellant respectfully submits that the decision of the Philadelphia Civil Service Commission could not have been

based solely upon the testimony of the Appellant as to how much time he spent in New Jersey. Moreover, Appellant submits that the Commonwealth Court's statement: ". . . it is clear that the Commission based its decision, not on the hearsay complained of, . . ." is not an accurate portrayal of the Record before your Honorable Court. Inasmuch as the Philadelphia Civil Service Commission received and admitted the hearsay evidence, it is not possible to say whether the Commission based any part of its decision on this tainted testimony. Accordingly, Appellant prays that your Honorable Court review the Record after excising the hearsay testimony to which Appellant objected at the Philadelphia Civil Service hearing.

V. Although the Commonwealth Court cites the case of *Alburger v. Alburger*, 138 Pa. Superior Ct. 339 (1939) for the proposition that "bona fide residence" means "domicile," the following propositions are also contained in the *Alburger* decision.

(a) The exercise of the right of suffrage conclusively shows residence with a domiciliary intent.

(b) When a change in residence is alleged, the burden of proving it rests upon the one making the allegation. Applying these principles to the instant case, it can be seen that at no time did Appellant exercise his right of suffrage in the State of New Jersey, and moreover, there is not even a scintilla of evidence that Appellant (not his wife and children) did anything to change his domicile from Philadelphia to New Jersey, nor is there any evidence of an intention to remain in New Jersey.

Again in the last page of the majority Opinion, the Commonwealth Court states:

> . . . Appellant spent on the average as much time in New Jersey as he did in his mother's home in Philadelphia, . . .

This statement is not accurate. The Record does not show that Appellant spent "on the average" as much time in New Jersey as he did at his mother's home in Philadelphia. The

Record is clear on this point, i.e., that on a weekly basis, Appellant sometimes did not spent any nights in New Jersey with his wife and children.

In reaching its decision, the Commonwealth Court appears to be establishing as the law of Pennsylvania, that a woman may change the domicile of her husband without his consent. The Commonwealth Court, it would seem, has in effect, ignored the Equal Rights Amendment of the Pennsylvania Constitution, and moreover it has created a reversal of the old common law rule that the husband determines the domicile of his family. The effect of the Commonwealth Court's decision is that a wife, by taking herself and her children to another state, can change the domicile of her unwilling husband.

In support of its decision the Commonwealth Court also states:

> "Appellant was the sole support of his wife and family living in New Jersey; Appellant continued to maintain a marital relationship with his wife. . . ."

One might interpret the Commonwealth Court's emphasis upon Appellant's good marital relationship to mean that if Appellant had divorced his wife, and if he had refused to support his wife and children, that the Court's decision might have been otherwise in this case. Thus it can be seen that because of Appellant's desire to continue his love for his family and to honor his legal and moral obligations to his wife and children, he is penalized by the loss of his job and other benefits which accrue by virtue of his sixteen years service in the Philadelphia Fire Department.

Although the Commonwealth Court states in the concluding sentence of the majority Opinion:

> In such a situation the self-serving declaration cannot be conclusive but must yield to the intent which the acts and conduct of the person clearly indicate.

Appellant's declaration of his "bona fide residence" is no self-serving declaration. Appellant submitted to the Philadelphia Civil Service Commission substantial evidence as

to his "bona fide residence." He did not simply come before the Philadelphia Civil Service Commission and say "I am a bona fide resident of the City of Philadelphia." By uncontroverted testimony of the Appellant, his mother, his wife, and his son, together with physical, tangible evidence to support his contention, Appellant established that he was in fact a "bona fide resident" of the City of Philadelphia.

Although the Commonwealth Court states that the intention of "bona fide residence" must be determined by the acts and conduct of the person, i.e., Lt. McCarthy, the Commonwealth Court has adopted the position of the Philadelphia Civil Service Commission and the Court of Common Pleas of Philadelphia County, that it is not the acts and conduct of Lt. McCarthy which determine his "bona fide residence" but rather the acts and conduct of his wife and children determine Lt. McCarthy's residence, thus preventing Lt. McCarthy from having any say whatsoever as to his intention of retaining his "bona fide residence" in the City of Philadelphia.

5. Copies of the Briefs and the Record filed in this case in the Commonwealth Court accompany this Petition.

WHEREFORE, Petitioner prays that he be allowed to Appeal from the decision of the Commonwealth Court aforesaid to this Honorable Court.

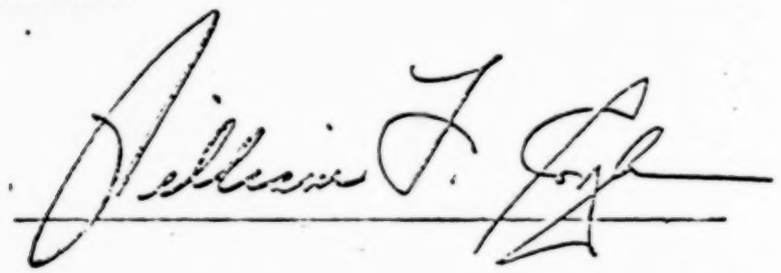
WILLIAM F. COYLE
Attorney for Petitioner

COMMONWEALTH OF PENNSYLVANIA:

SS

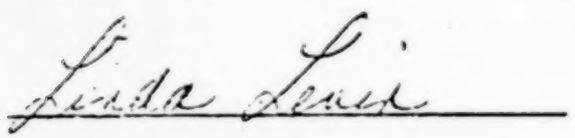
COUNTY OF PHILADELPHIA :

WILLIAM F. COYLE, being duly sworn according to law, deposes and says that he is Attorney for Petitioner in the foregoing action; that he is duly authorized to take this affidavit on his behalf; and that the facts contained therein are true and correct to the best of his knowledge, information and belief.



WILLIAM F. COYLE

Sworn to and Subscribed
before me this 26th day
of June, 1975.



Notary Public

APPENDIX E

Denial of Allocatur
By Pennsylvania Supreme Court

Appendix E

IN THE
SUPREME COURT
OF PENNSYLVANIA
FOR THE EASTERN DISTRICT

ALLOCATUR DOCKET NO. 2015

P.A. 4724
East. Dist.

Francis McCarthy, *Appellant*

vs.

Philadelphia Civil Service Commission

Petition for Allowance of
Appeal From the Commonwealth
Court to the Supreme Court
of Pennsylvania

9/2/75
Denied By the Court

Filed in
Supreme Court June 27, 1975,
Eastern District

William F. Coyle, Esquire

Law Offices
ABRAHAMS & LOEWENSTEIN
Fourteenth Floor, Land Title Building
Philadelphia, Pa. 19110

Appendix E

COMMONWEALTH OF PENNSYLVANIA
Supreme Court—Eastern District ss:

I, Sally M. Mrvos, Prothonotary of the Supreme Court of Pennsylvania, in and for the Eastern District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire backer of Petition for Allowance of Appeal from Commonwealth Court of Pennsylvania, with Order endorsed thereon dated 9/2/75, denying the Petition, Per Curiam in the case of Francis McCarthy, Petitioner v. Philadelphia Civil Service Commission at No. 2015 Allocatur Docket, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record and of the whole of the original thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court, at Philadelphia, in the County of Philadelphia, in the said Eastern District of Pennsylvania, this **twenty-fourth** day of **November** in the year of our Lord One Thousand Nine Hundred and **seventy five.**

Sally Mrvos
Prothonotary

APPENDIX F

Notice of Appeal In
Supreme Court of Pennsylvania

Appendix F

IN THE
SUPREME COURT
OF PENNSYLVANIA

Francis McCarthy,
Appellant

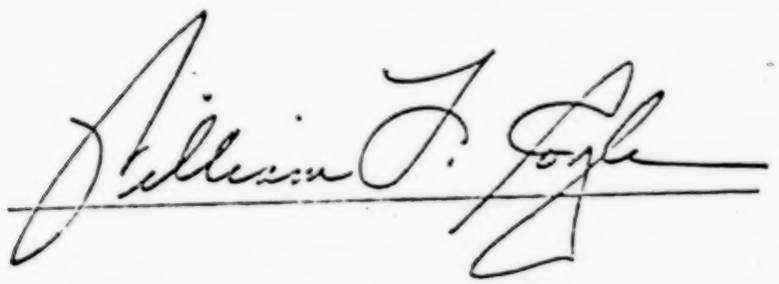
v. No. 2015 Allocatur Docket

Philadelphia Civil Service
Commission,
Appellee

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Francis McCarthy, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Pennsylvania, denying ALLOCATUR, entered in this action September 2, 1975.

This appeal is taken pursuant to 28 U.S.C. §1257(2).



William F. Coyle
Attorney for Appellant

November 24, 1975

APPENDIX G

Relevant Statutes

Appendix G

Statutes

Section 7-401. Contents. The regulations shall provide for:

* * *

(u) Such residence qualifications for employees in the civil service as the Council may from time to time require but the Civil Service Commission may, upon the request of the Personnel Director, waive any such requirements whenever, in its discretion, the circumstances warrant such waiver;

(v) Such other matters as may be proper and necessary.

30 - RESIDENCE REQUIREMENT

30.01 *Requirements.* An Ordinance of Council, Bill 79, effective April 16, 1953, enacted pursuant to authority of Section 7-401(u) of the Charter, requires each employee to have been a bona fide resident of the City for a period of one (1) year prior to his appointment and after appointment to maintain his bona fide residence in the City, unless such residence requirement is waived by the Commission.

* * *

TITLE 20. OFFICERS AND EMPLOYEES

Chapter 20-100: General Provisions

§20-101 Residence Requirements

(1) No person shall be appointed as an employee in the civil service of the City unless he has been a bona fide resident of the City for at least one year prior to his appointment.

(2) Every employee in the civil service shall maintain his bona fide residence in the City. The City Controller may require proof of the residence of any employee in the civil service.

(3) The Civil Service Commission may, upon the request of the Personnel Director, waive the above residence qualifications when in its discretion the circumstances warrant a waiver.

* * *